

BEFORE THE

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# Federal Communications Commission

WASHINGTON, D.C. 20554

AUG 1 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of  
Billed Party Preference  
for 0+ InterLATA Calls

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CC Docket No. 92-77

## COMMENTS OF CAPITAL NETWORK SYSTEM, INC.

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## SUMMARY

Capital Network System, Inc. ("CNS") has been an active participant in every stage of this proceeding. CNS urges the Commission to terminate the proceeding, and instead to focus on eliminating certain discriminatory regulations and business practices that increase the operating costs of small/regional OSPs such as CNS vis-a-vis AT&T and local exchange carriers which possess dominant market power.

According to the Commission's own estimates, the costs of implementing BPP would be staggering. These estimated costs include \$1.1 billion in nonrecurring charges and \$60 million in recurring expenses that would be incurred by LECs, and \$120 million in nonrecurring charges that would be foisted upon OSPs. However, common sense and experience indicate that the actual costs of implementing BPP probably would be much higher than these estimates. Because these staggering costs will have to be borne by users of operator services, and because these users already have other means by which to quickly and easily access OSPs of their choice, the Commission should terminate any plans to proceed with implementation of BPP.

Notwithstanding the costs, Congress and the Commission already have taken action that, according to the Commission's own findings, have eliminated most of the problems commonly associated with the operator services industry. For instance, through the use of access codes and debit cards, callers already have the ability to reach their preferred OSPs easily, at any time, and from any location. Therefore, because one of the primary benefits to implementing BPP identified by the Commission would be the ability of callers to avoid using a particular OSP if they so choose, implementation of BPP is unnecessary.

Moreover, implementation of BPP, by eliminating the incentive for call aggregators to enter into presubscription agreements with OSPs, would drive many small/regional OSPs out of business. This would have an extremely deleterious impact on the now vibrant OSP industry, eliminate thousands of newly created jobs, and create an oligopoly in which only the three or four largest OSPs are likely to remain economically viable.

Implementation of BPP would also serve to frustrate and confuse callers. In this regard, the Commission itself indicates that BPP must be available on a uniform, nationwide basis or it will cause tremendous confusion for callers. However, it is unlikely that BPP would be available on a uniform, nationwide basis because the Commission lacks jurisdiction under the Communications Act to mandate implementation of BPP for intrastate operator-assisted calls.

As if the foregoing did not provide ample reasons for not mandating implementation of BPP, the Commission should also consider that BPP, if implemented, likely would violate the Fifth Amendment's Takings Clause and the Administrative Procedures Act. BPP, by eliminating the incentive for OSPs to enter into

presubscription agreements with call aggregators, would render the telecommunications equipment of call aggregators virtually worthless and, absent just compensation, likely violate the constitutional prohibition against "taking" property without just compensation. Moreover, because the costs of implementing BPP would be so enormous and clearly outweigh any benefits, mandating implementation of BPP would be inconsistent with the evidence before the Commission and constitute an "arbitrary and capricious" and irrational decision in violation of the APA.

In light of the foregoing, CNS urges the Commission, in lieu of mandating implementation of BPP, to take the following steps to lower the operating costs of small/regional OSPs and enable them to lower their rates. First, the Commission should require all LECs, not just the BOCs and GTE which have such an obligation under their respective consent decrees, to provide all OSPs with nondiscriminatory billing and collection services. Many independent LECs will not provide billing and collection services to OSPs such as CNS even though every LEC in the country provides such services to AT&T. By requiring LECs to provide all OSPs with billing and collection services on a nondiscriminatory basis, the Commission could reduce significantly their operating costs, and hence their rates, without incurring the enormous expense or engendering the controversy that will attend implementation of BPP.

Second, not only do small/regional OSPs such as CNS face discrimination in the mere availability of billing and collection services, they also face discrimination in the pricing of those services by LECs that do provide such services. Specifically, it costs most LECs and AT&T much less for each call billed and collected through the exclusive use of their pre-divestiture system than it does for CNS to have calls billed and collected pursuant to individually negotiated billing and collection agreements. Therefore, for this reason as well, CNS urges the Commission to exercise its regulatory authority and require all LECs to provide all OSPs with billing and collection services on a nondiscriminatory basis.

Finally, CNS urges the Commission to restrict use of AT&T's CIID card to access code calling, or in the alternative, to require that AT&T provide CNS and other OSPs with nondiscriminatory access to the validation information necessary to complete calls made using CIID cards. Because AT&T will not provide CNS with the validation information needed to complete calls made using the CIID card, CNS must transfer these calls for completion by AT&T at a tremendous cost to CNS.

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## COMMENTS OF CAPITAL NETWORK SYSTEM, INC.

Capital Network System, Inc. ("CNS"), by its undersigned attorneys, hereby submits these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") adopted by the Federal Communications Commission ("Commission") on May 19, 1994 in the above-captioned proceeding.<sup>1/</sup>

### I. INTRODUCTION AND BACKGROUND

1. CNS is an interexchange carrier ("IXC") headquartered in Austin, Texas. Founded in 1988, CNS's primary business is the provision of operator-assisted calling services. While it also provides direct dial services to businesses and residential customers, the provision of operator services predominates.

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<sup>1/</sup> FCC 94-117 (released June 6, 1994). In a decision adopted by the Commission on June 24, 1994, the deadline for filing comments on the FNPRM was extended from July 8, 1994 to August 1, 1994. Billed Party Preference for 0+ InterLATA Calls, DA 94-703 (released June 24, 1994).

2. Today, CNS employs over 250 people. CNS is committed to the welfare of its employees and the larger Austin community. As an example of this commitment, CNS twice has been honored as "Employer of the Year" by the Texas Commission for the Blind because of the career opportunities offered by CNS to Texans who are blind or visually impaired. These career opportunities are made possible by the fact that CNS invested in special operator station equipment usable by blind and visually impaired persons.

3. Since its founding, CNS actively has attempted to lower its operating costs by obtaining the elimination of anticompetitive regulations and business practices that favor dominant carriers at the expense of smaller, innovative carriers. To the extent CNS is able to lower its operating costs by eliminating or at least reducing the disadvantages it faces in competing with the entrenched dominant carriers, CNS would be able to lower its rates.

4. In light of the foregoing, CNS has participated in every phase of the instant proceeding, and in each phase, consistently has argued against adoption of a billed party preference ("BPP") system. Rather, CNS consistently has urged the Commission to adopt measures, such as those discussed below regarding nondiscriminatory provision of billing and collection services by local exchange carriers ("LECs") and competitive safeguards concerning American Telephone and Telegraph Company's ("AT&T's") Card Issuer Identifier ("CIID") calling cards, that will lower the operating costs of small, innovative carriers vis-a-vis the

operating costs of dominant carriers. In this way, CNS and other small, innovative carriers could offer lower prices for their services.

5. As envisioned by the Commission, BPP would enable all "0+" calls to be routed to an operator service provider ("OSP") preselected by the party paying for the call rather than to the OSP chosen by the owner of the telephone from which the call is placed. In the FNPRM, the Commission tentatively concludes that adoption of BPP would be in the public interest because, based on the Commission's preliminary analysis, the benefits of a BPP system would outweigh the costs of implementing such a system. More specifically, the Commission claims that the following benefits would inure from implementation of BPP: (1) BPP would facilitate access to the telephone network by simplifying calling card, collect, and third party billed calling;<sup>2/</sup> (2) BPP would require OSPs to focus on serving end users rather than paying commissions to call aggregators;<sup>3/</sup> (3) BPP would enable some of AT&T's competitors to compete more effectively for customers that cannot or do not use calling cards;<sup>4/</sup> and (4) BPP would reduce the costs incurred by regulatory agencies because it would reduce the number of complaints filed against OSPs and the need to actively regulate OSP rates.<sup>5/</sup>

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<sup>2/</sup> FNPRM at ¶¶ 10 and 11.

<sup>3/</sup> FNPRM at ¶ 12.

<sup>4/</sup> FNPRM at ¶¶ 14 and 15.

<sup>5/</sup> FNPRM at ¶ 16.



6. Offset against these benefits, the Commission, based on information generated two years ago in response to the Notice of Proposed Rulemaking ("NPRM") in this proceeding,<sup>6/</sup> identifies a number of costs to be considered in deciding whether to implement BPP. These are as follows: (1) approximately \$1.1 billion in nonrecurring charges and \$60 million in annual recurring expenses would be incurred by LECs;<sup>7/</sup> (2) approximately \$120 million in nonrecurring charges would be incurred by OSPs;<sup>8/</sup> (3) possible degradation of OSP service quality by requiring callers to provide billing information twice;<sup>9/</sup> and (4) potential adverse impact on the ability of small and/or regional OSPs, as well as competitive pay telephone providers, to remain economically viable.<sup>10/</sup>

7. In the FNPRM, the Commission tentatively concludes that, on balance, the aforementioned benefits to implementing BPP outweigh the aforementioned costs.<sup>11/</sup> Nevertheless, because much of the data underlying its cost/benefit analysis is now stale, the Commission asks for further comment on its analysis and a number of other issues. Among other things, the Commission

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<sup>6/</sup> Billed Party Preference for 0+ InterLATA Calls, 7 FCC Rcd 3027 (1992).

<sup>7/</sup> FNPRM at ¶ 27.

<sup>8/</sup> FNPRM at ¶ 28.

<sup>9/</sup> FNPRM at ¶¶ 29 to 31.

<sup>10/</sup> FNPRM at ¶¶ 32 and 33.

<sup>11/</sup> FNPRM at ¶ 37.

asks for comment on how consumers should choose their preferred "0+" carrier and, if necessary, a secondary carrier(s) if BPP is implemented. In this regard, the Commission tentatively concludes that, if BPP is implemented, LECs should ballot their customers to determine their preferred and secondary "0+" carriers and that customers who do not return their ballots should be defaulted to their preferred "1+" carriers.<sup>12/</sup> With regard to its tentative conclusion to default LEC customers to their preferred "1+" carriers, the Commission indicates that "[w]hile some parties urge an allocation mechanism, such as that used in equal access balloting, we do not believe that those kinds of allocation procedures would be appropriate to BPP balloting."<sup>13/</sup> Rather, the Commission indicates that "most customers have already selected a preferred long-distance carrier ... [and that it] ... should not ignore this choice in assigning customers to a "0+" carrier."<sup>14/</sup>

8. Similarly, the Commission asks for comment on its tentative conclusion that BPP, if implemented, should apply to all "0+" and "0-" calls that cross Local Access and Transport Areas ("LATAs").<sup>15/</sup> The Commission notes that "[a] primary goal of BPP is to enable consumers to reach their preferred carriers easily and with minimum confusion ... [and] ... that uniform

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<sup>12/</sup> FNPRM at ¶¶ 65 to 69.

<sup>13/</sup> FNPRM at ¶ 67.

<sup>14/</sup> Id.

<sup>15/</sup> FNPRM at ¶ 47.

nationwide '0+' and '0-' calling rules are most consistent with this goal."<sup>16/</sup> In fact, the Commission indicates that "different dialing rules for different locations would confuse callers, and undermine the benefits of simplified operator service calling."<sup>17/</sup> Nonetheless, despite the enormous number of intraLATA "0+" and "0-" calls, the Commission tentatively concludes that BPP, if implemented, would apply only to "0+" and "0-" calls, but does not "address whether it could or should require BPP for intraLATA calling."<sup>18/</sup>

## **II. DISCUSSION**

### **A. THE BILLED PARTY PREFERENCE PROCEEDING SHOULD BE TERMINATED PROMPTLY**

9. The tentative conclusion reached by the Commission in the FNPRM that the benefits of BPP will outweigh the costs is not supported by the record evidence thus far compiled in this proceeding, and it is difficult to conceive of any evidence that might be submitted to the Commission in response to the FNPRM which will change this fact. Moreover, notwithstanding the Commission's tentative conclusions in the FNPRM, an overwhelming majority of the participants in this proceeding, which consist of a broad cross-section of the telecommunications industry

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<sup>16/</sup> FNPRM at ¶ 47.

<sup>17/</sup> FNPRM at ¶ 49.

<sup>18/</sup> FNPRM at ¶ 47 and n. 74.

including consumer groups, state regulatory agencies, independent LECs, a number of the Bell Operating Companies ("BOCs"), small/regional OSPs such as CNS, and AT&T, oppose implementation of BPP. The reason for this is simple and compelling - the costs of implementing BPP would be enormous while the proffered benefits of BPP are negligible. Consequently, CNS once again urges the Commission to terminate this proceeding promptly and, as discussed below, to focus its efforts on eliminating anticompetitive regulations and business practices favoring dominant carriers so as to help lower the operating costs, and hence the rates, of small/regional OSPs relative to those of dominant carriers.

**1. Implementation of Billed Party Preference Is Not Necessary Due to the Ability of Callers to Reach Their Preferred Provider of Operator Services By Using Access Codes and Other Means**

10. Now, even more than ever before, BPP is a solution in search of a problem. Congress and the Commission already have taken action that, according to the Commission's own findings as far back as November of 1992, have eliminated most of the problems experienced by callers in the operator services market.<sup>19/</sup> Thus, as the Competitive Telecommunications Association ("CompTel") noted in its Comments on the NPRM, the

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<sup>19/</sup> See Final Report of the Federal Communications Commission Pursuant to the Telephone Consumer Services Improvement Act of 1990 (released November 13, 1992) ("TOCSIA Report").

Commission has created an effective system of "dialing party preference," and this system has already resolved the basic problems which, according to the Commission, BPP is intended to rectify.<sup>20/</sup>

11. Pursuant to the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"), the Commission, in 1991, adopted rules requiring OSPs to provide "950" or "800" access codes for their customers to reach them and required call aggregators to unblock all carrier access codes.<sup>21/</sup> More recently, the Commission determined in the TOCSIA Report that callers are becoming accustomed to using access codes and that, by using these codes, are generally able to reach their preferred OSPs.<sup>22/</sup> In fact, MCI Communications Corporation ("MCI"), one the few proponents of BPP, has been very successfully marketing its "800" number - 1-800-COLLECT - for many months, and other IXCs, such as AT&T with its 1-800-OPERATOR number, have been doing the same.

12. Relatedly, as a result of the marketing efforts of many different companies, prepaid telephone calling cards, commonly

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<sup>20/</sup> Comments of CompTel at 5 and 6 (dated July 7, 1992).

<sup>21/</sup> Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation, 6 FCC Rcd 4736 (1991) ("Operator Services Order").

<sup>22/</sup> Specifically, the Commission indicated in the TOCSIA Report that "800" access codes had "achieved substantial marketplace acceptance" and that its "actions have enabled consumers, in the vast majority of cases, to reach their carrier of choice thereby enabling them to pay reasonable rates." TOCSIA Report at 29 and 30.

referred to as debit cards, have become an increasingly popular means by which callers can access their preferred OSPs.<sup>23/</sup> Over the past year, debit cards have been introduced by a wide variety of carriers, including AT&T, MCI, Sprint Corporation ("Sprint"), and many of the smaller IXC's, and as was pointed out in the New York Times a few months ago, their use has "grown exponentially in the last year from novel promotional gimmicks (including one offered by McDonalds to induce sales of burgers and fries) to an entire industry of entrepreneurs who are scrambling to get in on one of the latest, and most lucrative, phone services."<sup>24/</sup> Revenues from the sale of debit cards are expected to be between \$100 and \$300 million for 1994, and could easily exceed \$1 billion by next year.<sup>25/</sup> Because debit cards are used primarily at call aggregator locations, these cards represent another popular way, apart from the use of traditional access codes, by which callers can access their preferred OSPs and thereby avoid presubscribed OSPs. As such, because one of the primary concerns underlying the Commission's tentative conclusions in the FNPRM is that callers be able to avoid using a particular OSP if they so choose, and because callers can already do just that when they

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<sup>23/</sup> Debit cards allow callers to pay in advance for their telephone services. Typically, debit cards are sold in varying denominations and are either obtained directly from a carrier or through retail or other outlets. To use debit cards, callers simply dial an "800" number and then enter their debit card number.

<sup>24/</sup> New York Times, May 28, 1994 at § 1, p. 1, col. 2.

<sup>25/</sup> Id.

wish by using a variety of calling methods including access codes and debit cards, BPP, with all of the attendant costs and problems outlined below, is totally unnecessary.

13. In addition, BPP is unnecessary because, even in the absence of using access codes, debit cards, and BPP, callers are connected to their OSP of choice 60 percent of the time.<sup>26/</sup> Many callers have no preferred OSP and their use of "0+" dialing automatically connects them to a perfectly acceptable OSP.

14. It is only when a caller has a strong preference for an OSP other than the presubscribed OSP that BPP arguably offers any benefits. Even in this situation, however, access code dialing or the use of debit cards are convenient substitutes for BPP. Callers need only dial a few digits, usually a five digit code or an easily remembered "800" number when using debit cards, in order to connect to a different OSP.<sup>27/</sup> This "burden" obviously is minimal when compared to the substantial disruption and costs - described in detail below - that would attend implementation of BPP. Therefore, in light of the foregoing, implementation of BPP is unwise and unnecessary because callers already have the ability to reach their preferred OSPs easily, at any time, and from any location.

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<sup>26/</sup> Comments of CompTel at 7 (dated July 7, 1992).

<sup>27/</sup> As CNS indicated in its Comments on the NPRM, callers that use "800" numbers to reach their preferred OSPs need only dial ten digits, and OSPs can select those digits in a mnemonic sequence that would be easy to remember. Comments of CNS at ¶ 17 (dated June 2, 1992). Indeed, as pointed out above, this is what already has occurred in the marketplace.

**2. Implementation of Billed Party Preference Would Harm the Competitive OSP Market and Undermine Small Businesses and Job Creation**

15. In recent years and particularly within the last year, the Commission has made continual references in its decisions to the impact that those decisions will have on the economy and the creation and/or preservation of jobs.<sup>28/</sup> If BPP is implemented, however, the Commission will undermine the economic viability of many of the small/regional OSPs like CNS and eliminate many thousands of jobs in the process. Moreover, implementation of BPP would destroy the highly competitive nature of the current OSP market where there are hundreds of companies offering operator services, and replace it with an oligopoly in which only three or four of the largest IXC's carry virtually all operator services traffic.

16. The operator services market today is extremely competitive. The number of entities responding to the NPRM reflects the fact that there are a large number of very diverse companies which compete vigorously in the provision of operator

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<sup>28/</sup> For instance, in a news release issued a few weeks ago announcing the adoption of competitive bidding procedures for broadband Personal Communications Services, the Commission justified its adoption of the procedures in part by indicating that "[t]his decision will ... generate economic growth and create hundreds of thousands of new jobs." Commission Adopts Competitive Bidding Procedures for Broadband PCS, Report No. DC 2621 (released June 29, 1994). In many other decisions as well, the Commission has referred to the impact of its decision on the creation and/or preservation of jobs.



services.<sup>29/</sup> These companies serve the public by offering an ever increasing array of rate structures and service options. Moreover, many of these companies play an important role in their communities. For instance, CNS has created more than 250 new jobs in the Austin area in the last five years and, as indicated above, has been a leader within Texas in employing blind and visually impaired persons. These new companies also contribute significantly to the tax base of their communities. Regrettably, implementation of BPP would change all of this.

17. As the Commission is aware, initially most OSPs are able to survive and grow primarily by obtaining presubscription agreements from call aggregators. Implementation of BPP would eliminate the ability of most small/regional OSPs to obtain these presubscription agreements. This would undoubtedly drive many small/regional OSPs out of business - eliminating many of the jobs created by these OSPs and reversing the increasingly competitive nature of the OSP industry - because, unlike AT&T, MCI, and Sprint, these OSPs do not have an entrenched base of "1+" customers that automatically would presubscribe to their "0+" services. Thus, without a doubt, BPP, if implemented, would oligopolize the operator services market and exact a heavy toll on the economy and communities across the nation.

18. As indicated above, while the Commission proposes to help small/regional OSPs remain viable by allowing callers to

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<sup>29/</sup> Reply Comments of CompTel at 29 and 30 (dated August 27, 1994).

choose both a preferred and secondary OSPs,<sup>30/</sup> it is unreasonable to assume that callers will choose to deal with multiple OSPs - one or more small/regional OSPs as their preferred OSP(s) and a larger, nationwide OSP as their secondary OSP - when a single large, nationwide OSP can satisfy all of their operator service requirements. As One Call explained in its Comments on the NPRM:

Instead of selecting an unwieldy herd of OSPs to cover 0+ services in different regions, consumers will naturally choose the large OSP operating nationwide as their only OSP. While the Commission pretends that primary/secondary OSP selection will yield competitive results, the reality is that BPP will devastate smaller OSPs.<sup>31/</sup>

It is also unreasonable to believe that an OSP's competitors - either large, nationwide carriers or small/regional OSPs - would be willing to enter into arrangements on an equitable basis to be a secondary provider for a small/regional OSP. Absent Commission-mandated requirements for exchange of traffic and close supervision of the terms and conditions of such exchange, there is no reason to believe that direct competitors will have incentives to reach equitable primary/secondary carrier arrangements. Consequently, most small/regional OSPs would not be able to remain economically viable under BPP, and as indicated above, BPP therefore would have the effect of creating an oligopoly in which only the three or four largest OSPs would be able to survive.

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<sup>30/</sup> FNPRM at ¶¶ 68 and 69.

<sup>31/</sup> Comments of One Call at 17 (dated July 7, 1992) (emphasis in the original).

19. Moreover, as if implementation of the BPP concept will not do enough damage to the state of competition in the OSP industry and the economy, the balloting procedures proposed in the FNPRM by which callers will be able to select "0+" carriers drives home the injurious nature of the proposal.<sup>32/</sup> Using history and common sense as a guide, the number of ballots returned in response to such a balloting procedure is likely to be very small.<sup>33/</sup> In this regard, during a similar balloting procedure used by the Commission in 1985 for LEC customers to select "1+" carriers, most LECs only received about a 30 percent response from their customers. Instead, under the Commission's proposal, most LEC customers will be defaulted to their "1+" carrier.<sup>34/</sup> Therefore, because the "1+" market is dominated by AT&T, MCI, and Sprint, the Commission's proposal to default callers to their "1+" carrier will have the anticompetitive effect of further squeezing the small/regional OSPs out of the operator services market.

20. In addition to the foregoing, the Commission's proposal to default customers that do not affirmatively select a "0+"

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<sup>32/</sup> As indicated above, the Commission tentatively concludes in the FNPRM to require that each LEC notify its customers of their right to choose a "0+" carrier and provide each customer with a ballot for doing so. FNPRM at ¶ 65. The Commission indicates that those who do not choose a carrier will be defaulted to their "1+" carrier. FNPRM at ¶ 67.

<sup>33/</sup> Investigation of Access and Divestiture Related Tariffs, 101 F.C.C.2d 911, 919 (1985) ("Equal Access Order").

<sup>34/</sup> The Commission blithely states that it "should not ignore this choice [of "1+" carriers] in assigning customers a 0+ carrier." FNPRM at ¶ 67.

carrier to their "1+" carrier is inconsistent with previous findings of the Commission concerning the distinctness of the two markets. Specifically, in response to a petition filed by International Telecharge, Inc. on July 21, 1987 which argued that AT&T's Private Payphone Commission Plan was unlawful, the Commission indicated that "1+" and "0+" services "are sufficiently distinct ... that consumers generally use them in different contexts."<sup>35/</sup> The Commission went on to distinguish the "1+" and "0+" markets in the following way:

"0+" is operator-assisted and "1+" is not. Customers normally use operator assistance when calling away from home or to bill calls to another telephone number. Customers use "1+" service when they wish to be billed at the telephone from which the call is placed. AT&T itself recognizes the difference since it charges customer surcharges for placing different types of operator-assisted calls. Indeed, we have concluded that the two services in AT&T's payphone plan have separate customers ... In addition, "0+" and "1+" services are marketed in different manners and some companies can provide "0+" services but not "1+" services and some companies market "1+" services but not "0+" services. Although the issue is not without some doubt, on balance we believe that "0+" and "1+" services are sufficiently distinct [and should not, therefore, be tied together under AT&T's Private Payphone Commission Plan].<sup>36/</sup>

Therefore, the proposed balloting procedures would conflict with Commission precedent recognizing the distinctness of the "1" and "0+" markets and, when combined with the larger anticompetitive consequences of implementing BPP, be disastrous for the long-term

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<sup>35/</sup> AT&T's Private Payphone Commission Plan, 3 FCC Rcd 5834, 5837 (1988); see also, Revisions to AT&T Communications Tariff No. 1 Hospitality Network Services, 3 FCC Rcd 975 (1988) (the Commission intimated that the market for "0+" services is separate and distinct from the market for "1+" services).

<sup>36/</sup> Id.

viability of a competitive OSP industry - one which could be expected to contribute positively to the development of the nation's telecommunications infrastructure as many of the newer OSPs mature, stabilize, and branch out into provision of other telecommunications services.<sup>37/</sup>

3. **Billed Party Preference Would Confuse and Frustrate Callers Because Most Callers Have Just Recently Become Accustomed to Using Access Codes and Because Billed Party Preference Would Not Be Available In Connection With Many IntraLATA Calls**

21. Just over a year and a half after acknowledging in the TOCSIA Report that use of access codes were gaining wide acceptance by callers who wished to dial around a presubscribed OSP, the Commission has tentatively concluded that implementation of BPP would be in the public interest. In other words, now that carriers have spent hundreds of millions of dollars implementing the Commission's access code requirements and educating callers on how to use those codes,<sup>38/</sup> the Commission is proposing to require the investment of over a billion more dollars on a new

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<sup>37/</sup> If the Commission chooses to proceed with implementation of BPP despite the anticompetitive consequences, economic harm, and contrary precedent, it should, at a minimum, require LECs to follow the balloting procedures established by the FCC in the Equal Access Order rather than arbitrarily defaulting LEC customers that do not return ballots to their "1+" carrier. Equal Access Order at 924 and 926. Generally speaking, the Equal Access Order required LECs to allocate their customers among the various "1+" carriers in proportion to number of customers that affirmatively choose each carrier in initial balloting. Id. In this way, all LEC customers that fail to return their ballots will not automatically be defaulted to AT&T, MCI, or Sprint.

<sup>38/</sup> Operator Services Order, 6 FCC Rcd 4736.

dialing scheme that effectively would supplant the use of access codes and create an additional layer of complexity for users of operator services. Aside from the waste of resources already expended on installing new equipment and educating the public, implementation of BPP is certain to confuse and frustrate the public just as it is finally becoming comfortable with access codes.

22. As the Commission is aware, IXCs have expended considerable financial and other resources establishing access codes and educating callers on how to use them, and many are now expending additional financial and other resources marketing debit cards. MCI, as pointed out above, has been successfully marketing its "800" number for months, and other IXCs, including AT&T, have been doing the same. As also discussed above, debit cards, which like access codes would be rendered practically obsolete by BPP, have become a popular method of initiating calls from pay telephones and other call aggregator locations. In light of the foregoing, introduction of BPP at this late date would confuse and frustrate the public, including the more than 60 percent who have no need for BPP, and render the enormous investments made in access codes and debit cards virtually worthless.

23. Moreover, as the Commission notes in the FNPRM, BPP, if implemented, must be offered on a uniform, nationwide basis or it will cause enormous confusion for callers.<sup>39/</sup> In this regard,

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<sup>39/</sup> FNPRM at ¶ 47.

if BPP is not available on a nationwide basis, it is clear that, as a practical matter, callers will never know whether they can utilize BPP at different call aggregator locations.<sup>40/</sup> However, even if the Commission mandates implementation of BPP, it likely will not be available on a uniform, nationwide basis because the Commission lacks jurisdiction under the Communications Act of 1934 ("Act") to compel use of BPP for the provision of intrastate operator services.<sup>41/</sup> While a number of state regulatory agencies indicated in their comments and reply comments on the NPRM that they support implementation of BPP, they also pointed out that jurisdiction over intrastate operator service calls is reserved to the states under the Act.<sup>42/</sup> In addition, the Commission, while expressing hope in the FNPRM that the states would implement BPP if it decides in favor of implementation, also seems to recognize that it does not have authority to

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<sup>40/</sup> The Commission, as noted above, acknowledges that "different dialing rules for different locations would confuse callers, and undermine the benefits of simplified operator service calling." FNPRM at ¶ 49.

<sup>41/</sup> While Section 2(a) of the Act provides the Commission with jurisdiction over matters involving interstate and foreign communications, Section 2(b) of the Act reserves to the states jurisdiction over intrastate communications. 47 U.S.C. § 152 (a) and (b) (1994). Also, Section 226(d) of the Act, added by TOCSIA, required the Commission to establish rules governing OSPs, but in this regard, limits the Commission's regulatory authority to interstate calls. 47 U.S.C. § 226 (d) (1994). See also, Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n, 106 S.Ct. 1890 (1986).

<sup>42/</sup> Reply Comments of the New York Department of Public Service at 3 (dated August 27, 1992); Comments of the Illinois Commerce Commission, the Indiana Utility Regulatory Commission, the Public Utilities Commission of Ohio, and the Public Service Commission of Wisconsin at 12 and 13 (dated July 7, 1992).

implement BPP on a uniform, nationwide basis.<sup>43/</sup> Because approximately three-quarters of all calls originate and terminate in the same LATA<sup>44/</sup> - the overwhelming majority of which are intrastate calls - it is certain that, even if the Commission decides to implement BPP, it likely will not be available on anything close to a uniform, nationwide basis. Accordingly, if the Commission mandates implementation of BPP, it only will be available on a sporadic basis throughout the nation, and callers will never know where and when it will be available. The confusion this will cause is almost unimaginable and clearly unacceptable.

**4. Implementation of Billed Party Preference Would Be Unconstitutional and In Violation of the Administrative Procedures Act**

24. The principle that property owners must be allowed to recover fair compensation for use of their property is fundamental to our economic system and embodied as an integral component of the United States Constitution.<sup>45/</sup> For this

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<sup>43/</sup> Specifically, the Commission indicates that it does not address whether it "could or should require BPP for intraLATA calling." FNPRM at n. 74 (emphasis added).

<sup>44/</sup> Report of the Federal Communications Commission on Operator Services for 1991 at 3 (released November 13, 1992).

<sup>45/</sup> The Fifth Amendment to the United States Constitution prohibits the federal government from taking "private property ... for public use, without just compensation." U.S. Const. amend. V. There should be no doubt but that the ownership of call aggregator equipment is a property interest protected by the Fifth Amendment, (continued...)



reason, because BPP would render the telecommunications equipment of call aggregators virtually worthless if implemented, absent just compensation, BPP probably would be unconstitutional. Moreover, and as a separate matter, in light of the below-discussed costs that would be incurred to implement BPP, a decision by the Commission to implement BPP necessarily would violate Section 553 of the Administrative Procedures Act ("APA") which prohibits agencies from making "arbitrary and capricious" decisions because the costs of going forward clearly outweigh the benefits.<sup>46/</sup>

25. Currently, there are over 225,000 pay telephones in operation across the nation, and thousands of hotels, motels, airports, colleges and universities, and other institutions nationwide have invested in state-of-the-art private branch exchanges and call accounting systems.<sup>47/</sup> The owners of this call aggregator equipment presently are able to anticipate recovering their investment in this equipment by entering into presubscription agreements with OSPs. If the Commission proceeds

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<sup>45/</sup> (...continued)  
and that the proposed regulations governing use of call aggregator equipment associated with BPP constitutes public use of that equipment. See Andrus v. Allard, 444 U.S. 51, 65 (1979) (the court broadly interpreted the definition of a property interest). In fact, if the proposed use of call aggregator equipment were not for public use, the Commission's BPP proposal would be unlawful regardless of whether just compensation is paid to owners of call aggregator equipment. See Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937).

<sup>46/</sup> 5 U.S.C. § 553 (1994).

<sup>47/</sup> Comments of CompTel at 25 (dated July 7, 1992).